

# Judicial Council of California Civil Jury Instructions

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CACI\*

Supplement With New & Revised Instructions  
Current Through  
June 24, 2005, Judicial Council Meeting

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Series 100–2300



**Judicial Council of California**  
**Advisory Committee on Civil Jury Instructions**

Hon. James D. Ward, Chair

\* Pronounced "Casey"

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**June 24, 2005**

*This supplement to the 2005 edition of CACI includes all of the new and revised jury instructions and special verdict forms acted on at the Judicial Council of California meeting of June 24, 2005.*

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4011 . . . . .	None
4012 . . . . .	None
4013 . . . . .	None
VF-4000 . . . . .	None



## **100. Preliminary Admonitions**

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**You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.**

**Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and co-workers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.**

**During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.**

**After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.**

**During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that**

**you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff].**

**Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.**

**It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.**

**Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.**

**When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.**

**You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.**

**At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.**

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### Directions for Use

This instruction should be given at the outset of every case.

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that “it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.”

### Sources and Authority

- Article I, section 16 of the California Constitution provides that “trial by jury is an inviolate right and shall be secured to all.”
- Code of Civil Procedure section 608 provides, in part: “In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact.” (See also Evid. Code, § 312; Code Civ. Proc., § 592.)
- Under Code of Civil Procedure section 611, jurors may not “form or express an opinion” prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443–444 [54 Cal.Rptr. 68].)
- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)
- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)
- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)

- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)
- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)
- Jurors must avoid bias: “The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) “It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury's determination.” (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

(Revised June 2005)

## **107. Witnesses**

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**A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.**

**In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:**

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?**
- (b) How well did the witness remember and describe what happened?**
- (c) How did the witness look, act, and speak while testifying?**
- (d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?**
- (e) What was the witness's attitude toward this case or about giving testimony?**

**Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.**

**However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully**

**about some things but told the truth about others, you may accept the part you think is true and ignore the rest.**

**Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.**

**You must not be biased in favor of or against any witness because of his or her race, sex, religion, occupation, sexual orientation, [or] national origin [or *[insert any other impermissible form of bias]]*.**

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### **Directions for Use**

This instruction should be given as an introductory instruction.

### **Sources and Authority**

- Evidence Code section 312 provides:

Except as otherwise provided by law, where the trial is by jury:

  - (a) All questions of fact are to be decided by the jury.
  - (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.
- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  - (a) His demeanor while testifying and the manner in which he testifies.
  - (b) The character of his testimony.

- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
  - (d) The extent of his opportunity to perceive any matter about which he testifies.
  - (e) His character for honesty or veracity or their opposites.
  - (f) The existence or nonexistence of a bias, interest, or other motive.
  - (g) A statement previously made by him that is consistent with his testimony at the hearing.
  - (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
  - (i) The existence or nonexistence of any fact testified to by him.
  - (j) His attitude toward the action in which he testifies or toward the giving of testimony.
  - (k) His admission of untruthfulness.
- Evidence Code section 411 provides that “[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.” According to former Code of Civil Procedure section 2061, the jury should be instructed that “they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.”
  - The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: “It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar.” (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

## Secondary Sources

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

*(Revised June 2005)*

### 370. Common Count: Money Had and Received

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[Name of plaintiff] claims that [name of defendant] owes [him/her/it] money. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] received money that was intended to be used for the benefit of [name of plaintiff];
  2. That the money was not used for the benefit of [name of plaintiff]; and
  3. That [name of defendant] has not given the money to [name of plaintiff].
- 

#### Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of their case.

#### Sources and Authority

- “The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.’ However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [842 P.2d 121, 14 Cal.Rptr.2d 822], internal citations and footnote omitted.)
- “Although such an action is one at law, it is governed by principles of equity. It may be brought ‘wherever one person has received money which belongs to another, and which “in equity and good conscience,” or in other words, in justice and right,

should be returned. . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' ” (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- “ ‘The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received.’ Recovery is denied in such cases unless the defendant himself has actually received the money.” (*Rotea v. Izuel* (1939) 14 Cal.2d 605, 611 [95 P.2d 927], internal citations omitted.)
- “[S]ince the basic premise for pleading a common count . . . is that the person is thereby ‘waiving the tort and suing in assumpsit,’ any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and . . . ‘one cannot be held to be a constructive trustee of something he had not acquired.’ One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money.” (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)
- “ ‘This kind of action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances.’ ” (*Minor v. Baldrige* (1898) 123 Cal. 187, 191 [55 P. 783], internal citation omitted.)
- “ ‘As Witkin states in his text, “[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express



contract, a contract implied in fact, or a quasi-contract.” ’ A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract.” (*Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- “In the common law action of general assumpsit, it is customary to plead an indebtedness using ‘common counts.’ In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are ‘(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.’ A cause of action for money had and received is stated if it is alleged the defendant ‘is indebted to the plaintiff in a certain sum “for money had and received by the defendant for the use of the plaintiff.” ’ ” (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- “A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)
- “A cause of action is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum ‘for money had and received by the defendant for the use of the plaintiff.’ The cause of action is available where, as here, the plaintiff has paid money to the defendant pursuant to a contract which is void for illegality.” (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623 [33 Cal.Rptr.2d 276], internal citations omitted.)
- “ ‘It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, under duress, oppression or where an undue advantage was taken of

plaintiffs' situation whereby money was exacted to which the defendant had no legal right.' ” (*J.C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 353, 361 [16 Cal.Rptr. 518], internal citations omitted.)

### Secondary Sources

4 Witkin, *California Procedure* 4th (1997) Pleading, § 522

12 *California Forms of Pleading and Practice*, Ch. 121, *Common Counts*, §§ 121.24[1], 121.51 (Matthew Bender)

4 *California Points and Authorities*, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

(New June 2005)

### 371. Common Count: Goods and Services Rendered

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[Name of plaintiff] claims that [name of defendant] owes [him/her/it] money for [goods delivered/services rendered]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] requested, by words or conduct, that [name of plaintiff] [perform services/deliver goods] for the benefit of [name of defendant];
  2. That [name of plaintiff] [performed the services/delivered the goods] as requested;
  3. That [name of defendant] has not paid [name of plaintiff] for the [services/goods]; and
  4. The reasonable value of the [goods/services] that were provided.
- 

#### Sources and Authority

- “‘The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.’ However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [842 P.2d 121, 14 Cal.Rptr.2d 822], internal citations and footnote omitted.)
- “To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant.” (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [9 Cal.Rptr.3d 734], internal citation omitted.)

- “[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit.” (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [90 Cal.Rptr.2d 665].)
- “Although such an action is one at law, it is governed by principles of equity. It may be brought ‘wherever one person has received money which belongs to another, and which “in equity and good conscience,” or in other words, in justice and right, should be returned. . . . The plaintiff’s right to recover is governed by principles of equity, although the action is one at law.’ ” (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- “ ‘As Witkin states in his text, “[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.” ’ A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract.” (*Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- “In the common law action of general assumpsit, it is customary to plead an indebtedness using ‘common counts.’ In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are ‘(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.’ ” (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- “A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative

way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

### Secondary Sources

4 Witkin, *California Procedure* 4th (1997) Pleading, § 515

12 *California Forms of Pleading and Practice*, Ch. 121, *Common Counts*, §§ 121.25, 121.55–121.58 (Matthew Bender)

4 *California Points and Authorities*, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

(*New June 2005*)

### **372–399. Reserved for Future Use**

## 400. Essential Factual Elements

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[Name of plaintiff] claims that [he/she] was harmed by [name of defendant]'s negligence. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] was negligent;
  2. That [name of plaintiff] was harmed; and
  3. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm.
- 

### Directions for Use

In medical malpractice or professional negligence cases, the word “medical” or “professional” should be added before the word “negligence” in the first paragraph.

### Sources and Authority

- Civil Code section 1714(a) provides, in part: “Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.” This statute is the foundation of negligence law in California. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111–112 [70 Cal.Rptr. 97, 443 P.2d 561].)
- The basic elements of a negligence action are: (1) The defendant had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendant failed to meet this standard of conduct, (3) the defendant’s failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496]; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

- Restatement Second of Torts, section 328A, provides:

In an action for negligence the plaintiff has the burden of proving:

  - (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
  - (b) failure of the defendant to conform to the standard of conduct,
  - (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
  - (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.
- The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury. (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 [211 Cal.Rptr. 356, 695 P.2d 653].) The trier of fact ordinarily determines whether the defendant breached the standard of care, causation, and the amount of damages, if any.

### Commentary

The word “harm” is used throughout these instructions, instead of terms like “loss,” “injury,” and “damage,” because “harm” is all-purpose and suffices in their place.

### Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 729–734, 748, 749

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01–1.31, Ch. 2, *Causation*, §§ 2.01–2.11, Ch. 3, *Proof of Negligence*, §§ 3.01–3.34 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.4–1.18

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*  
(Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.10,  
165.20 (Matthew Bender)

*(Revised June 2005)*



#### **424. Negligence Not Contested—Essential Factual Elements**

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*[Name of plaintiff]* **claims that [he/she] was harmed by [name of defendant]’s negligence. [Name of defendant] agrees that [he/she/it] was negligent, but denies that the negligence caused [[name of plaintiff] any harm/the full extent of the harm claimed by [name of plaintiff]].**

**To establish [his/her/its] claim against [name of defendant], [name of plaintiff] must prove both of the following:**

- 1. That [name of plaintiff] was harmed; and**
  - 2. That [name of defendant]’s negligence was a substantial factor in causing [name of plaintiff]’s harm.**
- 

#### **Directions for Use**

This instruction is intended for cases in which the defendant “admits” liability, but contests causation and damages. This instruction can be modified for use in cases involving claims that are not based on negligence.

#### **Secondary Sources**

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, Ch. 2, *Causation* (Matthew Bender)

(New June 2005)

#### **425–429. Reserved for Future Use**

### 430. Causation: Substantial Factor

---

**A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.**

---

#### Directions for Use

As phrased, this definition of “substantial factor” subsumes the “but for” test of causation, e.g., plaintiff must prove that but for defendant’s conduct, the same harm would not have occurred. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239–1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) The first sentence of the instruction accounts for the “but for” concept. Conduct does not “contribute” to harm if the same harm would have occurred without such conduct. “Conduct,” in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff’s alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The “but for” test does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049 [1 Cal.Rptr.2d 913, 819 P.2d 872].) Accordingly, do not use this instruction in such a case.

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires an additional instruction regarding exposure to a particular product. See Instruction 435, *Causation for Asbestos-Related Cancer Claims*.

Tentative Draft No. 3 (April 7, 2003) for the Restatement Third of Torts, in its treatment of Torts: Liability for Physical Harm (Basic Principles), section 29, proposes a “scope of liability” approach that

de-emphasizes causation and focuses on (1) the nature of the harms that are within the scope of the risk created by the actor's conduct and (2) whether those harms resulted from the risk; this Restatement is not final, and it has not been subject to California judicial review.

### Sources and Authority

- *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 [1 Cal.Rptr.2d 913, 819 P.2d 872].
- “However the test is phrased, causation in fact is ultimately a matter of probability and common sense.” (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d of Torts, § 433B, com. b.)
- *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313–1314 [37 Cal.Rptr.2d 541].
- Restatement Second of Torts, section 431, provides: “The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.” This section “correctly states California law as to the issue of causation in tort cases.” (*Wilson v. Blue Cross of Southern California* (1990) 222 Cal.App.3d 660, 673 [271 Cal.Rptr. 876].)
- This instruction incorporates Restatement Second of Torts, section 431, comment a, which provides, in part: “The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense,’ which includes every one of the great number of events without which any happening would not have occurred.”

### Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 968, pp. 358–359, *id.* (2002 supp.) Torts, § 968A, pp. 253–256

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.02 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.13–1.15

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

(Revised June 2005)

## 1000. Essential Factual Elements

---

**[Name of plaintiff] claims that [he/she] was harmed because of the way [name of defendant] managed [his/her/its] property. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] [owned/leased/occupied/controlled] the property;**
  - 2. That [name of defendant] was negligent in the use or maintenance of the property;**
  - 3. That [name of plaintiff] was harmed; and**
  - 4. That [name of defendant]’s negligence was a substantial factor in causing [name of plaintiff]’s harm.**
- 

### Directions for Use

For cases involving public entity defendants, see instructions on dangerous conditions of public property (CACI No. 1100, et seq.).

### Sources and Authority

- As a general rule, “[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill *in the management of his or her property* or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.” (Civ. Code, § 1714(a), italics added)
- “Since *Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561], the liability of landowners for injuries to people on their property has been governed by general negligence principles.” (*Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, 1407 [72 Cal.Rptr.2d 206].)
- Premises liability is a “form of negligence” in which the owner has a duty to exercise ordinary care in the management of the premises to avoid exposing persons to an unreasonable risk of

harm. (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619 [264 Cal.Rptr. 756].)

- The general rule of premises liability is set forth in *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 [178 Cal.Rptr. 783, 636 P.2d 1121], which states that a landowner has a “duty to take affirmative action for the protection of individuals coming upon the land . . . .” This duty arises because ownership of land includes the right to control and manage the premises. The landowner’s “mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act.” (*Id.* at p. 370.) The right to control the premises lies at “ ‘the very heart of the ascription of tortious responsibility’ ” in premises liability actions. (*Id.* at p. 369.)
- Ordinarily, “[a] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control.” (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134 [211 Cal.Rptr. 356, 695 P.2d 653].) However, “[a] defendant need not own, possess and control property in order to be held liable; control alone is sufficient.” (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 [60 Cal.Rptr.2d 448, 929 P.2d 1239].)
- Mere maintenance does not establish control. A landowner’s duty to warn or prevent injury from known hazards on abutting property derives from ownership, possession, or control, not mere maintenance. (*Alcaraz, supra*, 14 Cal.4th at p. 1170.)

## Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 891–895

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 16:1–16:3

*(Revised June 2005)*

## 1301. Assault—Essential Factual Elements

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**[Name of plaintiff] claims that [name of defendant] assaulted [him/her]. To establish this claim, [name of plaintiff] must prove all of the following:**

- [1. That [name of defendant] acted, intending to cause harmful [or offensive] contact;**
- 2. That [name of plaintiff] reasonably believed that [he/she] was about to be touched in a harmful [or an offensive] manner;]**
- [or]**
- [1. That [name of defendant] threatened to touch [name of plaintiff] in a harmful [or an offensive] manner;**
- 2. That it reasonably appeared to [name of plaintiff] that [name of defendant] was about to carry out the threat;]**
- 3. That [name of plaintiff] did not consent to [name of defendant]’s conduct;**
- 4. That [name of plaintiff] was harmed; and**
- 5. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

**[A touching is offensive if it offends a reasonable sense of personal dignity.]**

**[Words alone do not amount to an assault.]**

---

### Directions for Use

For a definition of “intent,” see CACI No. 1320, *Intent*. The last bracketed sentence should be read in cases in which there is a dispute as to whether the defendant’s conduct involved more than words.

### Sources and Authority

- “ ‘Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of



another then present.’ A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm.” (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6–7 [146 P.2d 57], internal citation omitted.)

- “The tort of assault is complete when the anticipation of harm occurs.” (*Kiseskey v. Carpenters’ Trust for Southern California* (1983) 144 Cal.App.3d 222, 232 [192 Cal.Rptr 492].)
- Restatement Second of Torts, section 21 provides:
  - (1) An actor is subject to liability to another for assault if
    - (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
    - (b) the other is thereby put in such imminent apprehension.
  - (2) An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.
- Words alone do not amount to an assault. (*Tomblinson v. Nobile* (1951) 103 Cal.App.2d 266, 269 [229 P.2d 97].)
- Restatement Second of Torts, section 31 provides: “Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.”

## Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 346–368

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[4] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.15 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 12:3–12:6

*(Revised June 2005)*

## VF-1302. Assault

---

We answer the questions submitted to us as follows:

- [1. Did *[name of defendant]* act, intending to cause a harmful [or an offensive] contact with *[name of plaintiff]* or intending to place [him/her] in fear of a harmful or an offensive contact?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of plaintiff]* reasonably believe that [he/she] was about to be touched in a harmful [or an offensive] manner?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [1. Did *[name of defendant]* threaten to touch *[name of plaintiff]* in a harmful [or an offensive] manner?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did it reasonably appear to *[name of plaintiff]* that [he/she] was about to be touched in a harmful [or an offensive] manner?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. Did *[name of plaintiff]* consent to *[name of defendant]*'s conduct?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was *[name of defendant]*'s conduct a substantial factor in causing harm to *[name of plaintiff]*?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are *[name of plaintiff]*'s damages?

- [a. Past economic loss, including [lost earnings/  
lost profits/medical expenses:] \$\_\_\_\_\_]
- [b. Future economic loss, including [lost  
earnings/lost profits/lost earning capacity/  
medical expenses:] \$\_\_\_\_\_]
- [c. Past noneconomic loss, including [physical  
pain/mental suffering:] \$\_\_\_\_\_]
- [d. Future noneconomic loss, including [physical  
pain/mental suffering:] \$\_\_\_\_\_]

TOTAL \$\_\_\_\_\_

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

**[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].**

---

### **Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

As appropriate to the facts of the case, read one of the bracketed alternative sets of questions 1 and 2. This verdict form is based on CACI No. 1301, *Assault—Essential Factual Elements*.

Give the bracketed words in question 2 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

*(Revised June 2005)*



# Judicial Council of California Civil Jury Instructions

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## CACI\*

Supplement With New & Revised Instructions  
Current Through  
June 24, 2005, Judicial Council Meeting

2

Series 2400–5000



**Judicial Council of California  
Advisory Committee on Civil Jury Instructions**

Hon. James D. Ward, Chair

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# Table of New and Revised Judicial Council of California Civil Jury Instructions—CACI

**June 24, 2005**

*This supplement to the 2005 edition of CACI includes all of the new and revised jury instructions and special verdict forms acted on at the Judicial Council of California meeting of June 24, 2005.*

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4002 . . . . .	None
4003 . . . . .	None
4004 . . . . .	None
4005 . . . . .	None
4006 . . . . .	None
4007 . . . . .	None
4008 . . . . .	None
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4010 . . . . .	None
4011 . . . . .	None
4012 . . . . .	None
4013 . . . . .	None
VF-4000 . . . . .	None



**2701. Nonpayment of Minimum Wage—Essential  
Factual Elements (Lab. Code, § 1194)**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **owes [him/her] the difference between the wages paid by *[name of defendant]* **and the wages** *[name of plaintiff]* **should have been paid according to the minimum wage rate required by state law. To establish this claim, [name of plaintiff] must prove all of the following:****

- 1. That** *[name of plaintiff]* **performed work for** *[name of defendant]***;**
- 2. That** *[name of plaintiff]* **was paid less than the minimum wage by** *[name of defendant]* **for some or all hours worked; and**
- 3. The amount of wages owed.**

**The minimum wage for labor performed from** *[beginning date]* **to** *[ending date]* **was** *[minimum wage rate]* **per hour.**

**An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.**

---

**Directions for Use**

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, e.g., Cal. Code Regs., tit. 8, § 11000.) The jury must be instructed accordingly.

The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, § 11000, Subd. 3, § 11010, Subd. 10, and § 11150, Subd. 10(B)). The assertion of an exemption from wage and

hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].)

### Sources and Authority

- Labor Code section 1194(a) provides: “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”
- Labor Code section 1194.2 provides, in part:
  - (a) In any action under . . . Section 1194 to recover wages because of the payment of a wage less than the minimum wage, . . . an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.
  - (b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).
- Labor Code section 200 defines “wages” as including “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. . . . [¶] ‘Labor’ includes labor, work, or service whether rendered or

performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.”

- Labor Code section 206(a) provides: “In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.”
- Labor Code section 1193.6(a) provides, in part: “The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. . . . The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division.”
- Labor Code section 1173 provides, in part: “It is the continuing duty of the Industrial Welfare Commission . . . to ascertain the wages paid to all employees in this state, [and] to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state. . . . [¶] The commission shall conduct a full review of the adequacy of the minimum wage at least once every two years.”

## Secondary Sources

2 Witkin, *Summary of California Law* (9th ed. 1987) Agency and Employment, §§ 330, 335, pp. 321–322, 327–329; *id.* (2002 supp.) at §§ 330, 335, pp. 325–327, 341–343

1 Wilcox, *California Employment Law*, Ch. 2, *Minimum Wages*, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1], 2.20[1], 2.21[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)

Bancroft-Whitney's California Civil Practice: Employment Litigation  
(1993) Wage and Hour, §§ 4:67, 4:77, pp. 51, 56

*(Revised June 2005)*



## **2702. Nonpayment of Overtime Compensation— Essential Factual Elements (Lab. Code, § 1194)**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **owes [him/her] overtime pay as required by state law. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That *[name of plaintiff]* performed work for *[name of defendant]*;**
- 2. That *[name of plaintiff]* worked overtime hours;**
- 3. That *[name of plaintiff]* was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**
- 4. The amount of overtime pay owed.**

**Overtime hours are the hours worked longer than** *[insert applicable definition(s) of overtime hours]*.

**Overtime pay is** *[insert applicable formula]*.

**An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.**

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### **Directions for Use**

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, Subd. 2, § 11010, Subd. 4(A), and § 11150, Subd. 4(A).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

The assertion of an employee's exemption from overtime laws is an affirmative defense. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For example, outside salespersons are exempt from overtime requirements (see Lab. Code, § 1171). An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*) Because of the case-specific

nature of exemptions to overtime laws, the advisory committee has chosen not to write model instructions for these affirmative defenses.

### Sources and Authority

- Labor Code section 1194(a) provides: “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”
- Labor Code section 1194.2 provides, in part:
  - (a) In any action under . . . Section 1194 to recover wages because of the payment of a wage less than the minimum wage, . . . an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.
  - (b) Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).
- Labor Code section 200 defines “wages” as including “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. . . .[¶] ‘Labor’ includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or

other agreement if the labor to be paid for is performed personally by the person demanding payment.”

- “Absent an *explicit, mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. . . . [¶] Since there was no evidence of a wage agreement between the parties that appellant’s . . . per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, . . . appellant incurred damages of uncompensated overtime. . . .” (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725–726 [245 Cal.Rptr. 36].)
- “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee’s exemption.” (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794–795 [85 Cal.Rptr.2d 844, 978 P.2d 2].)
- “The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is . . . a mixed question of law and fact.” (*Ramirez, supra*, 20 Cal.4th at p. 794.)
- Labor Code section 206(a) provides: “In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.”
- Labor Code section 1193.6(a) provides, in part: “The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation. . . . The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division.”

## Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 330, 335, pp. 321–322, 327–329; *id.* (2002 supp.) at §§ 330, 335, pp. 325–327, 341–343

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:77, pp. 51, 56

(Revised June 2005)

## **2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked**

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State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If *[name of defendant]* did not keep accurate records of the hours worked by *[name of plaintiff]*, then *[name of plaintiff]* may prove the number of overtime hours worked by making a reasonable estimate of those hours.

In determining the amount of overtime hours worked, you may consider *[name of plaintiff]*'s estimate of the number of overtime hours worked and any evidence presented by *[name of defendant]* that *[name of plaintiff]*'s estimate is unreasonable. If you find *[name of plaintiff]*'s estimate to be reasonable, then you must accept it even though the result is only approximate.

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### **Directions for Use**

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

### **Sources and Authority**

- Labor Code section 1194(a) provides: “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than . . . the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this . . . overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”
- “Although the employee has the burden of proving that he performed work for which he was not compensated, public policy

prohibits making that burden an impossible hurdle for the employee. . . . ‘In such a situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.’ ” (*Hernandez, supra*, 199 Cal.App.3d at p. 727, internal citation omitted.)

- “It is the trier of fact’s duty to draw whatever reasonable inferences it can from the employee’s evidence where the employer cannot provide accurate information.” (*Hernandez, supra*, 199 Cal.App.3d at p. 728, internal citation omitted.)
- Labor Code section 1174(d) provides: “Every person employing labor in this state shall . . . [k]eep . . . payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years.”
- “Absent an *explicit, mutual* wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. . . . [¶] Since there was no evidence of a wage agreement between the parties that appellant’s . . . per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, . . . appellant incurred damages of uncompensated overtime.” (*Hernandez, supra*, 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

## Secondary Sources

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

(Revised June 2005)

## **2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)**

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**If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for [unpaid wages/[insert other claim]], then [name of plaintiff] may be entitled to receive an award of a civil penalty based on the number of days [name of defendant] failed to pay [his/her] wages when due.**

**To recover the civil penalty, [name of plaintiff] must prove all of the following:**

- 1. The date on which [name of plaintiff]’s employment ended;**
- 2. [That [name of defendant] failed to pay all wages due by [insert date];]**

*[or]*

**[The date on which [name of defendant] paid [name of plaintiff] all wages due;]**

- 3. [Name of plaintiff]’s daily wage rate at the time [his/her] employment with [name of defendant] ended; and**
- 4. That [name of defendant] willfully failed to pay these wages.**

**The term “wages” includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.**

**The term “willfully” means that the employer intentionally failed or refused to pay the wages.**

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### **Directions for Use**

This instruction is intended to instruct the jury on factual determinations required to assist the court in calculating waiting time



penalties under Labor Code section 203. The court must determine when final wages are due based on the circumstances of the case and applicable law—see Labor Code sections 201 and 202. If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).

The definition of “wages” may be deleted as redundant if it is redundant with other instructions.

### **Sources and Authority**

- Labor Code section 203 provides: “If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment. Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.”
- Labor Code section 218 provides, in part: “Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article.”
- Labor Code section 201 provides, in part: “If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.”

- Labor Code section 202 provides: “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.  
Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting.”
- Labor Code section 200 defines “wages” as including “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.  
. . . [¶] ‘Labor’ includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.”
- Labor Code section 227.3 provides, in part: “Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served. . . .”
- Labor Code section 206(a) provides: “In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.”
- “The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict interpretation. [¶]. . . [T]o be at fault within the meaning of the statute, the employer’s refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, ‘willful’

merely means that the employer intentionally failed or refused to perform an act *which was required to be done.*” (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7 [177 Cal.Rptr. 803].)

- “A proper reading of section 203 mandates a penalty equivalent to the employee’s daily wages for each day he or she remained unpaid up to a total of 30 days. . . . [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days.” (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)
- “‘A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.’ ” (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

## Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 335, pp. 327–329; *id.* (2002 supp.) at § 335, pp. 341–343

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

Bancroft-Whitney’s California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:76, pp. 51, 55–56

(Revised June 2005)

## **2705–2709. Reserved for Future Use**

**VF-2701. Nonpayment of Minimum Wage (Lab. Code,  
§ 1194)**

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**We answer the questions submitted to us as follows:**

- 1. Did [name of plaintiff] perform work for [name of defendant]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 2. Was [name of plaintiff] paid less than the minimum wage by [name of defendant] for some or all hours worked?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 3. How many hours was [name of plaintiff] paid less than the minimum wage?**

\_\_\_\_\_ hours

- 4. What is the amount of wages owed? \$\_\_\_\_\_**

**Signed: \_\_\_\_\_  
                Presiding Juror**

**Dated: \_\_\_\_\_**

**[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].**

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### Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 2701, *Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, § 1194)*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

*(Revised June 2005)*

**VF-2703. Waiting-Time Penalty for Nonpayment of  
Wages (Lab. Code, §§ 203, 218)**

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**We answer the questions submitted to us as follows:**

- 1. Did [name of plaintiff] perform work for [name of defendant]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 2. Did [name of defendant] discharge [name of plaintiff]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 3. Did [name of defendant] willfully fail to [pay/tender payment of] the full amount of wages earned by [name of plaintiff] on [his/her] last day of employment?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 4. For how many calendar days following [name of plaintiff]'s last day of employment did [name of defendant] willfully fail to [pay/tender payment of] the full amount of [name of plaintiff]'s wages? \_\_\_\_\_ days.**

**Answer question 5.**

- 5. What was [name of plaintiff]'s daily wage rate at the time [his/her] employment ended? \$\_\_\_\_\_ per day.**

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

**[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].**

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### **Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2704, *Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)*. Depending on the facts of the case, other factual scenarios can be substituted in questions 2, 3, and 4, as in elements 2, 3, and 4 in the instruction.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

*(Revised June 2005)*

**3100. Financial Abuse—Essential Factual Elements**  
**(Welf. & Inst. Code, § 15610.30)**

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*[Name of plaintiff]* claims that *[name of defendant]* violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of *[him/her/[name of decedent]]*. To establish this claim, *[name of plaintiff]* must prove all of the following are more likely to be true than not true:

1. That *[name of defendant]* *[insert one of the following:]*  
  
[[took/hid/appropriated/retained] *[name of plaintiff/decendent]*'s property;  
  
[[assisted in [taking/hiding/appropriating/retaining] *[name of plaintiff/decendent]*'s property;  
  
2. That *[name of plaintiff/decendent]* was [65 years of age or older/a dependent adult] at the time of the conduct;  
  
3. That *[name of defendant]* [[took/hid/appropriated/retained]/assisted in [taking/hiding/appropriating/retaining]] the property [for a wrongful use/[or] with the intent to defraud];  
  
4. That *[name of plaintiff/decendent]* was harmed; and  
  
5. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

[One way *[name of plaintiff]* can prove that *[name of defendant]* [[took/hid/appropriated/retained]/assisted in [taking/hiding/appropriating/retaining]] the property for a wrongful use is by proving both of the following:

1. That *[name of plaintiff/decendent]* had the right to have the property [transferred/made readily available] to *[him/her/[[his/her] [conservator/trustee/representative/attorney-in-fact]]*; and  
  
2. That *[name of defendant]* knew or should have known that *[name of plaintiff/decendent]* had this right.



**[Name of defendant] should have known that [name of plaintiff/decedent] had this right if, on the basis of information received by [[name of defendant]/[name of defendant]’s authorized third party], it would have been obvious to a reasonable person that [name of plaintiff/decedent] had the right to have the property [transferred/made readily available] to [him/her/[[his/her] [conservator/trustee/representative/attorney-in-fact]].**

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### Directions for Use

This instruction is intended for cases brought by the victim of the abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent’s pain and suffering should see CACI No. 3101, *Financial Abuse—Enhanced Remedies Sought Against Individual/Employee Defendant* (Welf. & Inst. Code, §§ 15657.5), or CACI No. 3102, *Financial Abuse—Enhanced Remedies Sought—Employer Defendant* (Welf. & Inst. Code, §§ 15657.5, 15610.30). The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

If the plaintiff is also seeking tort damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700, et seq.)

Add the bracketed portion if the plaintiff is seeking to prove wrongful use by showing that defendant acted in bad faith as defined by the statute. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

### Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:  
 “Abuse of an elder or a dependent adult” means either of the following:

- (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  - (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.
- Welfare and Institutions Code section 15610.30 provides:
  - (a) “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:
    - (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
    - (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
  - (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.
    - (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.
    - (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity’s authorized third party, or both, it is obvious to a reasonable person that the elder or

dependent adult has a right specified in paragraph (1).

- (c) For purposes of this section, “representative” means a person or entity that is either of the following:
  - (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
  - (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.
- Welfare and Institutions Code section 15657.5 provides:
  - (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney’s fees and costs. The term “costs” includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  - (b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney’s fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:
    - (1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.
    - (2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney’s fees

permitted under this section may be imposed against an employer.

- (c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.
- Welfare and Institutions Code section 15610.27 provides: “ ‘Elder’ means any person residing in this state, 65 years of age or older.”
- Welfare and Institutions Code section 15610.23 provides:
  - (a) “Dependent adult” means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  - (b) “Dependent adult” includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

## Secondary Sources

2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 14.5–14.6, 14.25–14.30, 14.38–14.47

(Revised June 2005)

**3101. Financial Abuse—Enhanced Remedies Sought  
Against Individual/Employee Defendant (Welf. & Inst.  
Code, § 15657.5)**

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**To recover enhanced remedies, including damages for [name of decedent]’s pain and suffering from the financial abuse, [name of plaintiff] must also prove by clear and convincing evidence that [name of individual/employee] acted with [recklessness/oppression/fraud/malice] in committing the abuse.**

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**Directions for Use**

This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering. Plaintiffs who are seeking conventional tort damages and attorney fees and costs only, should use CACI No. 3100, *Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)*. The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

If the plaintiff is seeking damages against the employer, use CACI No. 3102, *Financial Abuse—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657.5, 15610.30)*.

**Sources and Authority**

- Welfare and Institutions Code section 15610.07 provides:
  - “Abuse of an elder or a dependent adult” means either of the following:
    - (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
    - (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15657.5 provides:
  - (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  - (b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:
    - (1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.
    - (2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.
  - (c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.
- Welfare and Institutions Code section 15610.30 provides:
  - (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
    - (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult

to a wrongful use or with intent to defraud, or both.

- (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
- (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.
  - (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.
  - (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).
- (c) For purposes of this section, "representative" means a person or entity that is either of the following:
  - (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
  - (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.
- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."
- Welfare and Institutions Code section 15610.23 provides:

- (a) “Dependent adult” means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  - (b) “Dependent adult” includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’” (*Delaney, supra*, 20 Cal.4th at pp. 31–32, internal citations omitted.)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows



survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

### Secondary Sources

2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 14.5–14.6, 14.25–14.30, 14.38–14.47

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, §§ 5.33[4], 5.38 (Matthew Bender)

(Revised June 2005)

**3102. Financial Abuse—Enhanced Remedies Sought—  
Employer Defendant (Welf. & Inst. Code, §§ 15657.5,  
15610.30)**

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*[Name of plaintiff]* also claims that *[name of defendant employer]* is responsible for *[insert enhanced remedies]*. To establish this claim, *[name of plaintiff]* must prove by clear and convincing evidence *[insert one or more of the following four options:]*

1. [That *[name of employee]* was an officer, a director, or a managing agent of *[name of defendant employer]* acting in [a corporate/an employment] capacity;] [or]
2. [That an officer, a director, or a managing agent of *[name of defendant employer]* had advance knowledge of the unfitness of *[name of employee]* and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]
3. [That an officer, a director, or a managing agent of *[name of defendant employer]* authorized *[name of employee]*'s conduct;] [or]
4. [That an officer, a director, or a managing agent of *[name of defendant employer]* knew of *[name of employee]*'s wrongful conduct and adopted or approved the conduct after it occurred;] and

That *[name of employee]* acted with [recklessness/  
malice/oppression/fraud] in committing the abuse.

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

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**Directions for Use**

This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering and/or other enhanced remedies,

including attorney fees and costs, against an employer. Plaintiffs who are not seeking such damages should use CACI No. 3100, *Financial Abuse—Essential Factual Elements* (Welf. & Inst. Code, § 15610.30). The instructions in this set are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

There appears to be a misprint in Welfare and Institutions Code section 15657(b). The reference should be Code of Civil Procedure section 377.34.

### Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

“Abuse of an elder or a dependent adult” means either of the following:

  - (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  - (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.
- Welfare and Institutions Code, section 15657.5 provides:
  - (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney’s fees and costs. The term “costs” includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
  - (b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression,

fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:

- (1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.
  - (2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.
  - (c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.
- Welfare and Institutions Code section 15610.30 provides:
    - (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
      - (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
      - (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
    - (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.
      - (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent

adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

- (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).
- (c) For purposes of this section, "representative" means a person or entity that is either of the following:
  - (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
  - (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.
- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."
- Welfare and Institutions Code section 15610.23 provides:
  - (a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  - (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of

an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.”

- “[A] finding of ratification of [agent’s] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.’ ” (*Delaney, supra*, 20 Cal.4th at pp. 31–32, internal citations omitted.)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the

court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

## Secondary Sources

2 California Elder Law (Cont.Ed.Bar 1993–2002) §§ 14.5–14.6, 14.25–14.30, 14.38–14.47

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[4] (Matthew Bender)

(Revised June 2005)

**VF-3100. Financial Abuse—Individual/Employee  
Defendant—Enhanced Remedies Sought (Welf. & Inst.  
Code, §§ 15657.5, 15610.30)**

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**We answer the questions submitted to us as follows:**

- 1. Did *[name of defendant]* *[take/hide/appropriate/retain]* *[name of plaintiff/decedent]*'s property for a wrongful use *[or with the intent to defraud]*?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 2. Was *[name of plaintiff/decedent]* *[65 years of age or older/a dependent adult]* at the time of the conduct?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 3. Was *[name of defendant]*'s conduct a substantial factor in causing harm to *[name of plaintiff]*?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 4. Did *[name of plaintiff]* prove by clear and convincing evidence that *[name of defendant]* acted with *[recklessness/malice/oppression/fraud]*?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No



If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

Answer question 5.

**5. What are [name of plaintiff]'s damages?**

- [a. Past economic loss, including [lost earnings/  
lost profits/medical expenses:] \$\_\_\_\_\_]
- [b. Future economic loss, including [lost  
earnings/lost profits/lost earning capacity/  
medical expenses:] \$\_\_\_\_\_]
- [c. Past noneconomic loss, including [physical  
pain/mental suffering:] \$\_\_\_\_\_]
- [d. Future noneconomic loss, including [physical  
pain/mental suffering:] \$\_\_\_\_\_]

**TOTAL \$\_\_\_\_\_**

**Signed:** \_\_\_\_\_  
**Presiding Juror**

**Dated:** \_\_\_\_\_

**[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].**

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**Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements* (Welf. & Inst. Code, § 15610.30), and CACI No. 3101, *Financial Abuse—Enhanced Remedies Sought Against Individual/Employee Defendant* (Welf. & Inst. Code, § 15657.5).

Delete question 4 if enhanced remedies are not sought.

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of CACI No. 3101.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

*(Revised June 2005)*

**VF-3101. Financial Abuse—Employer Defendant (Welf. &  
Inst. Code, §§ 15657.5, 15610.30)**

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**We answer the questions submitted to us as follows:**

- 1. Did [name of defendant]’s employee [take/hide/  
appropriate/retain] [name of plaintiff/decedent]’s  
property for a wrongful use [or with the intent to  
defraud]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer  
question 2. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.**

- 2. Was [name of plaintiff/decedent] [65 years of age or  
older/a dependent adult] at the time of the conduct?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer  
question 3. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.**

- 3. Did [name of plaintiff] prove by clear and convincing  
evidence that the employee acted with [recklessness/  
malice/oppression/fraud]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 3 is yes, then answer  
question 4. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.**

- 4. Was the employee’s conduct a substantial factor in  
causing harm to [name of plaintiff]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] authorized the employee's conduct?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

- [a. Past economic loss, including [lost earnings/  
lost profits/medical expenses:] \$\_\_\_\_\_]
- [b. Future economic loss, including [lost  
earnings/lost profits/lost earning capacity/  
medical expenses:] \$\_\_\_\_\_]
- [c. Past noneconomic loss, including [physical  
pain/mental suffering:] \$\_\_\_\_\_]
- [d. Future noneconomic loss, including [physical  
pain/mental suffering:] \$\_\_\_\_\_]

TOTAL \$\_\_\_\_\_

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

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### Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements* (Welf. & Inst. Code, § 15610.30), and CACI No. 3102, *Financial Abuse—Enhanced Remedies Sought—Employer Defendant* (Welf. & Inst. Code, §§ 15657.5, 15610.30).

If the plaintiff alleges that the defendant's employees assisted in the wrongful conduct, modify question 1 as in element 2 of CACI No. 3102. Question 5 can be altered to correspond to one of the alternative bracketed options in element 7 of CACI No. 3102. If the employee was joined as a party and the jury fills out findings regarding enhanced remedies against the employee, then questions 1 through 4 and 6 probably do not need to be answered again on this form.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

*(Revised June 2005)*

## **3241. Restitution From Manufacturer—New Motor Vehicle**

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If you decide that *[name of defendant]* or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then *[name of plaintiff]* is entitled to recover the amounts *[he/she]* proves *[he/she]* paid for the car, including:

1. The amount paid to date for the vehicle, including finance charges [and any amount still owed by *[name of plaintiff]*];
2. Charges for transportation and manufacturer-installed options; and
3. Sales tax, license fees, registration fees, and other official fees.

In determining the purchase price, do not include any charges for items supplied by someone other than *[name of defendant]*.

*[[Name of plaintiff]'s recovery must be reduced by the value of the use of the vehicle before it was [brought in/submitted] for repair. [Name of defendant] must prove how many miles the vehicle was driven between the time when [name of plaintiff] took possession of the vehicle and the time when [name of plaintiff] first delivered it to [name of defendant] or its authorized repair facility to fix the defect. [Insert one of the following:]*

*[Using this mileage number, I will reduce [name of plaintiff]'s recovery based on a formula.]*

*[Multiply this mileage number by the purchase price, including any charges for transportation and manufacturer-installed options, and divide that amount by 120,000. Deduct the resulting amount from [name of plaintiff]'s recovery.]]*

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### Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. For claims involving other consumer goods, see CACI No. 3240, *Reimbursement Damages—Consumer Goods*. For claims involving incidental damages, see CACI No. 3242, *Incidental Damages*.

This instruction can be modified if it is being used for claims other than those described in the instructions. In lieu of restitution, plaintiff may request replacement with “a new motor vehicle substantially identical to the vehicle replaced,” pursuant to Civil Code section 1793.2(d)(2)(A). If plaintiff so requests, elements 1–3 should be replaced with appropriate language.

Modify element 1 depending on whether plaintiff still has an outstanding obligation on the financing of the vehicle.

The last two bracketed options are intended to be read in the alternative. Use the last bracketed option if the court desires for the jury to make the calculation of the deduction. The “formula” referenced in the last bracketed paragraph can be found at Civil Code section 1793.2(d)(2)(C).

### Sources and Authority

- Civil Code section 1794(b) provides:

The measure of the buyer’s damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

  - (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  - (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.
- Civil Code section 1793.2(d)(2) provides, in part:

If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.

- (A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
- (B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
- (C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall



only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

- “[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes ‘the cost of repairs necessary to make the goods conform.’ ” (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10], internal citation omitted.)
- “[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act.”

(*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]; see also *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187–192 [28 Cal.Rptr.2d 371].)

- “[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act’s remedial purpose and section 1793.2(d)(2)(B)’s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute.” (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

## Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308

1 California UCC Sales & Leases (Cont.Ed.Bar 2002) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney’s California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43

(Revised June 2005)

**VF-3200. Violation of Civil Code Section 1793.2(d)—  
Consumer Goods**

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**We answer the questions submitted to us as follows:**

- 1. Did [name of plaintiff] buy a[n] [consumer good] [from/  
distributed by/manufactured by] [name of defendant]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer  
question 2. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.**

- 2. Did [name of defendant] give [name of plaintiff] a  
warranty?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer  
question 3. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.**

- 3. Did the [consumer good] fail to perform as represented  
in the warranty?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 3 is yes, then answer  
question 4. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.**

- 4. Did [name of defendant] or its authorized repair facility  
repair the [consumer good] to conform to the [written  
statement/represented quality] after a reasonable  
number of opportunities?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 4 is no, then answer  
question 5. If you answered yes, stop here, answer no**

further questions, and have the presiding juror sign and date this form.

5. Did *[name of defendant]* fail to replace the *[consumer good]* or reimburse *[name of plaintiff]* the appropriate amount of money?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What amount is *[name of plaintiff]* entitled to receive as reimbursement for the *[consumer good]*? Calculate as follows:

Determine:	Purchase price of the <i>[consumer good]</i> :	\$_____
Subtract:	Value of use by <i>[name of plaintiff]</i> before <i>[he/she/it]</i> discovered the defect:	\$_____
Subtract:	The amount, if any, that <i>[name of defendant]</i> previously reimbursed <i>[name of plaintiff]</i> for the <i>[consumer good]</i>	\$_____
	<b>TOTAL</b>	<b>\$_____</b>

- [7. What amount is plaintiff entitled to recover for *[insert item(s) of claimed incidental damages]*? \$\_\_\_\_\_]

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

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### Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 3200, *Violation of Civil Code Section 1793.2(d)—Consumer Goods—Essential Factual Elements*, and CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of CACI No. 3200. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages. Question 7 can be used to account for claimed incidental damages included under CACI No. 3242, *Incidental Damages*.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

*(Revised June 2005)*

**VF-3202. Violation of Civil Code Section 1793.2(d)—  
Consumer Goods—Affirmative Defense—Unauthorized  
or Unreasonable Use**

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] buy a[n] [*consumer good*] [from/  
distributed by/manufactured by] [*name of defendant*]?  
  
\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer  
question 2. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.

2. Did [*name of defendant*] give [*name of plaintiff*] a  
warranty?  
  
\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer  
question 3. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.

3. Did the [*consumer good*] fail to perform as represented  
in the warranty?  
  
\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer  
question 4. If you answered no, stop here, answer no  
further questions, and have the presiding juror sign  
and date this form.

4. Was the failure to comply with the warranty caused  
by unauthorized or unreasonable use of the [*consumer  
good*] following its sale?  
  
\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is no, then answer  
question 5. If you answered yes, stop here, answer no

further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] or its authorized repair facility repair the [*consumer good*] to conform to the [written statement/represented quality] after a reasonable number of opportunities?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] fail to replace the [*consumer good*] or reimburse [*name of plaintiff*] the appropriate amount of money?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What amount is [*name of plaintiff*] entitled to receive as reimbursement for the [*consumer good*]? Calculate as follows:

Determine:	Purchase price of the [ <i>consumer good</i> ]:	\$_____
Subtract:	Value of use by [ <i>name of plaintiff</i> ] before [ <i>he/she/it</i> ] discovered the defect:	\$_____
Subtract:	The amount, if any, that [ <i>name of defendant</i> ] previously reimbursed [ <i>name of plaintiff</i> ] for the [ <i>consumer good</i> ]	\$_____
	<b>TOTAL</b>	\$_____

[Answer question 8.]

[8. What amount is [name of plaintiff] entitled to recover  
for [insert item(s) of claimed incidental damages]?  
\$\_\_\_\_\_]

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

[When signed/After all verdict forms have been signed], this  
verdict form must be delivered to the [clerk/bailiff/judge].

---

### Directions for Use

The special verdict forms in this section are intended only as models.  
They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3200, *Violation of Civil  
Code Section 1793.2(d)—Consumer Goods—Essential Factual  
Elements*, CACI No. 3220, *Affirmative Defense—Unauthorized or  
Unreasonable Use*, and CACI No. 3240, *Reimbursement Damages—  
Consumer Goods*.

If the plaintiff was unable to deliver the good, modify question 4 as  
in element 4 of CACI No. 3200. See CACI No. VF-3201 for  
additional questions in the event the plaintiff is claiming consequential  
damages. Question 8 can be used to account for claimed incidental  
damages included under CACI No. 3242, *Incidental Damages*.

If there are multiple causes of action, users may wish to combine the  
individual forms into one form.

(Revised June 2005)



**VF-3203. Breach of Express Warranty—New Motor  
Vehicle—Civil Penalty Sought**

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**We answer the questions submitted to us as follows:**

- 1. Did [name of plaintiff] [buy/lease] a[n] [new motor vehicle] [from/distributed by/manufactured by] [name of defendant]?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 2. Did [name of defendant] give [name of plaintiff] a written warranty?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 3. Did the vehicle have a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety to a reasonable [buyer/lessee] in [name of plaintiff]'s situation?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

- 4. Did [name of defendant] or its authorized repair facility fail to repair the defect[s] after a reasonable number of opportunities to do so?**

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] fail to promptly replace or repurchase the vehicle as requested by [*name of plaintiff*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? Calculate as follows:

Add the following amounts:

- a. The purchase price of the vehicle itself: \$\_\_\_\_\_
- b. Charges for transportation and manufacturer-installed options: \$\_\_\_\_\_
- c. Finance charges actually paid by [*name of plaintiff*]: \$\_\_\_\_\_
- d. Sales tax, license fees, registration fees, and other official fees: \$\_\_\_\_\_
- e. Incidental and consequential damages: \$\_\_\_\_\_
- [SUBTOTAL/TOTAL DAMAGES:] \$\_\_\_\_\_

[Calculate the value of the use of the vehicle before it was [brought in/submitted] for repair as follows:

- 1. Add lines a and b above: \$\_\_\_\_\_
- 2. Multiply the result in step 1 by the number of miles the vehicle was driven before it was [brought in/submitted] for repair: \$\_\_\_\_\_
- 3. Divide the result in step 2 by 120,000 and insert below:

VALUE OF USE: \$\_\_\_\_\_

Subtract the VALUE OF USE from the SUBTOTAL above and insert result in TOTAL DAMAGES below.

TOTAL DAMAGES: \$\_\_\_\_\_]

[What is the number of miles that the vehicle was driven between the time when *[name of plaintiff]* took possession of the vehicle and the time when *[he/she/it]* first delivered the vehicle to *[name of defendant]* or its authorized repair facility to fix the problem?

Answer: \_\_\_\_\_ miles]

Answer question 7.

7. Did *[name of defendant]* willfully fail to repurchase or replace the *[new motor vehicle]*?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What amount, if any, do you impose as a penalty?  
[You may not exceed two times the "TOTAL DAMAGES" that you entered on the last line of question 6.] \$\_\_\_\_\_

Signed: \_\_\_\_\_

Presiding Juror

Dated: \_\_\_\_\_

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

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### Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Items of damages that do not apply to the facts of the case may be omitted.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This verdict form is based on CACI No. 3201, *Violation of Civil Code Section 1793.2(d)—New Motor Vehicle—Essential Factual Elements*, CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*, and CACI No. 3244, *Civil Penalty—Willful Violation (Civ. Code, § 1794(c))*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of CACI No. 3201. In question number 6, users have the option of either allowing the jury to calculate the deduction for value of use, or asking the jury for the relevant mileage number only. The bracketed sentence in question 8 is intended to be given only if the jury as been asked to calculate the deduction for value of use.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

*(Revised June 2005)*

## VF-3206. Breach of Disclosure Obligations

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [buy/lease] a [*motor vehicle*] from [*name of defendant*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know or should [he/she/it] have known that the vehicle had been returned to the manufacturer under [California's/[*name of state*]'s] motor vehicle warranty laws?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Prior to the [sale/leasing], did [*name of defendant*] fail to disclose to [*name of plaintiff*], in clear and simple language, the nature of the defect experienced by the original [buyer/lessee] of the vehicle?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s failure to clearly disclose the defect a substantial factor in causing harm to [*name of plaintiff*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**5. What are [name of plaintiff]'s damages?                      \$\_\_\_\_\_**

**Signed: \_\_\_\_\_**  
**Presiding Juror**

**Dated: \_\_\_\_\_**

**[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].**

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### **Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This verdict form is based on CACI No. 3230, *Breach of Disclosure Obligations—Essential Factual Elements*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

If defendant is a manufacturer, substitute question 2 with a question modeled after the first bracketed option in element 2. Depending on the facts, question 4 can be modified to cover other grounds for breach of the warranty, as in elements 5 and 6 of CACI No. 3230. Make sure that the “yes” and “no” directions match appropriately.

Omit question 4 if the plaintiff is not seeking consequential damages.

*(Revised June 2005)*

### **3207–3299. Reserved for Future Use**

### 3901. Introduction to Tort Damages—Liability Established

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**If you decide that [name of plaintiff] was harmed and that [name of defendant]’s [insert description of cause of action, e.g., “negligence”] was a substantial factor in causing the harm, you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”**

**The amount of damages must include an award for each item of harm that was caused by [name of defendant]’s wrongful conduct, even if the particular harm could not have been anticipated.**

**[Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

**[The following are the specific items of damages claimed by [name of plaintiff]:]**

**[Insert applicable instructions on items of damage.]**

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#### Directions for Use

This instruction is intended for cases in which the defendant “admits” liability, but contests causation and damages. See CACI No. 424, *Negligence Not Contested—Essential Factual Elements*.

Read last bracketed sentence and insert instructions on items of damage here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI No. 3903A through CACI No. 3903N, and CACI No. 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Read CACI No. 430, *Causation: Substantial Factor*, as the definition of “substantial factor.”

### Sources and Authority

- Civil Code section 3333 provides: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”
- Civil Code section 3281 provides: “Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”
- Civil Code section 3283 provides: “Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.”
- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”
- Under Civil Code section 3333 “[t]ort damages are awarded to compensate a plaintiff for *all* of the damages suffered as a legal result of the defendant’s wrongful conduct.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)
- “Whatever its measure in a given case, it is fundamental that ‘damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.’ However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party.” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)
- “In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish ‘by proof the extent of the harm and the amount of money



representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.’ However, ‘[there] is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor’s conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.’ ” (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)

- “If plaintiff’s inability to prove his damages with certainty is due to defendant’s actions, the law does not generally require such proof.” (*Clemente, supra*, 40 Cal.3d at p. 219.)
- “While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant’s wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant’s conduct.” (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879].)

## Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1319–1326

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.2–1.6

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:1

*(Revised June 2005)*

# LANTERMAN-PETRIS-SHORT ACT

## 4000. Conservatorship—Essential Factual Elements

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[Name of petitioner] claims that [name of respondent] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [name of petitioner] must prove beyond a reasonable doubt all of the following:

1. That [name of respondent] [has a mental disorder/is impaired by chronic alcoholism];
  2. That [name of respondent] is gravely disabled as a result of the [mental disorder/chronic alcoholism]; and
  3. That [name of respondent] is unwilling or unable voluntarily to accept meaningful treatment.
- 

### Directions for Use

Element #3 may not be necessary in every case (see *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] [“[M]any gravely disabled individuals are simply beyond treatment.”]).

### Sources and Authority

- Welfare and Institutions Code section 5350(d) provides, in part: “The person for whom conservatorship is sought shall have the right to demand a court or jury trial on the issue whether he or she is gravely disabled.”
- Welfare and Institutions Code section 5008(h)(1)(A) provides, in part: “ ‘[G]ravely disabled’ . . . [means a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.”

- Welfare and Institutions Code section 5008(h)(2) provides, in part: “[G]ravely disabled” means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter.”
- “The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program.” (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [884 P.2d 988, 36 Cal.Rptr.2d 40].)
- “The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)
- “Noting that a finding of grave disability may result in serious deprivation of personal liberty, the [Supreme Court] held that the due process clause of the California Constitution requires that proof beyond a reasonable doubt and jury unanimity be applied to conservatorship proceedings under the LPS Act.” (*Conservatorship of Benvenuto, supra*, 180 Cal.App.3d at p. 1038, internal citations omitted.)
- “We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- “The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified.” (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)
- “Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. . . . Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act’s reach, according to the argument presented in this appeal.” (*Conservatorship of Symington, supra*, 209 Cal.App.3d at p. 1469.)
- “The party seeking imposition of the conservatorship must prove the proposed conservatee’s grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury.” (*Conservatorship of Susan T., supra*, 8 Cal.4th at p. 1009, internal citation omitted.)

## Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15

24 California Forms of Pleading and Practice, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(*New June 2005*)

## 4001. “Mental Disorder” Explained

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**The term “mental disorder” is limited to those disorders described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. This book is sometimes referred to as “the DSM [*current edition, e.g., “IV”*].”**

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### Directions for Use

This instruction is not intended for cases proceeding on a theory of impairment by chronic alcoholism only.

### Sources and Authority

“The term ‘mental disorder’ is limited to those disorders listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (Cal. Admin. Code, tit. 9, § 813).” (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 282, n. 5 [139 Cal.Rptr. 357].) “Although this [administrative] regulation has since been repealed, the practice has been to continue using the same definition.” (California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.17.)

### Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.17

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(*New June 2005*)

## 4002. “Gravely Disabled” Explained

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The term “gravely disabled” means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism]. [The term “gravely disabled” does not include mentally retarded persons by reason of being mentally retarded alone.]

[[*Insert one or more of the following:*] [Psychosis/bizarre or eccentric behavior/delusions/hallucinations/[*insert other*]] [is/are] not enough, by [itself/themselves], to find that [*name of respondent*] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]

[If you find [*name of respondent*] will not take [his/her] prescribed medication without supervision and that a mental disorder makes [him/her] unable to provide for [his/her] basic needs for food, clothing or shelter without such medication, then you may conclude [*name of respondent*] is presently gravely disabled.

In determining whether [*name of respondent*] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may also consider evidence of [his/her] lack of insight into [his/her] mental condition.]

In considering whether [*name of respondent*] is presently gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.

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### Directions for Use

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee see CACI No. 4007, *Third Party Assistance*.

### Sources and Authority

- Welfare & Institutions Code section 5008(h)(1)(A) provides, in part: “[G]ravely disabled” . . . [means] a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.”
- Welfare & Institutions Code section 5008(h)(2) provides, in part: “[G]ravely disabled” means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter.”
- Welfare & Institutions Code section 5008(h)(3) provides: “The term ‘gravely disabled’ does not include mentally retarded persons by reason of being mentally retarded alone.”
- “The enactment of the LPS and with it the substitution of ‘gravely disabled’ for ‘in need of treatment’ as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term ‘gravely disabled’ is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter.” (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], fns. omitted.)
- “The public guardian must prove the proposed conservatee was ‘gravely disabled’ beyond a reasonable doubt. The stricter criminal standard is used because the threat to the conservatee’s individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions.” (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)



- “Bizarre or eccentric behavior, even if it interferes with a person’s normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival.” (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)
- “We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)
- “[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled.” (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)
- “[T]he pivotal issue is whether [respondent] was ‘presently’ gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)
- “[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted.” (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)
- “A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory

provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

## Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.10

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, "Lanterman-Petris-Short Act and Related Proceedings" (Matthew Bender)

(New June 2005)

### **4003. “Gravely Disabled” Minor Explained**

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The term “gravely disabled” means that a minor is presently unable to use those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others, because of a mental disorder. [The term “gravely disabled” does not include mentally retarded persons by reason of being mentally retarded alone.]

[[*Insert one or more of the following:*] [physical or mental immaturity/developmental disabilities/epilepsy/alcoholism/drug abuse/ repeated antisocial behavior/psychosis/ bizarre or eccentric behavior/delusions/hallucinations/[*insert other*]] [is/ are] not enough, by [itself/themselves], to find that [*name of respondent*] is gravely disabled. [He/She] must be unable to use those things that are essential to health, safety, or development because of a mental disorder.]

[If you find [*name of respondent*] will not take [his/her] medication without supervision and that a mental disorder makes [him/her] unable to use those things that are essential to health, safety, or development without such medication, then you may conclude [*name of respondent*] is presently gravely disabled.

In determining whether [*name of respondent*] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may consider evidence of [his/her] lack of insight into [his/her] mental condition.]

In considering whether [*name of respondent*] is presently gravely disabled, you may not consider the likelihood of future deterioration relapse of a condition.

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### Directions for Use

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4008, *Third Party Assistance to Minor*.

### Sources and Authority

- Welfare and Institutions Code section 5585.25 provides: “ ‘Gravely disabled minor’ means a minor who, as a result of a mental disorder, is unable to use the elements of life which are essential to health, safety, and development, including food, clothing, and shelter, even though provided to the minor by others. Mental retardation, epilepsy, or other developmental disabilities, alcoholism, other drug abuse, or repeated antisocial behavior do not, by themselves, constitute a mental disorder.”
- “[T]he actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished *only* in accordance with the LPS Act.” (*In re Michael E.* (1975) 15 Cal.3d 183, 189 [538 P.2d 231, 123 Cal.Rptr. 103].)
- “The actual commitment of a minor ward of a juvenile court to a state hospital can be lawfully accomplished only through the appointment of a conservator who is vested with authority to place the minor in such a hospital. Such conservator may be appointed only for a ‘gravely disabled’ minor who is entitled to a jury trial on the issue whether he is in fact ‘gravely disabled.’  
Conservatorship shall be recommended to the court only if, on investigation, no suitable alternatives are available. The conservator’s proposed powers and duties are to be recommended to the court. A conservator may commit the minor to a medical facility, including a state hospital, only when specifically authorized by the court. Conservatorships automatically terminate

at the end of one year, and every six months a conservatee may petition for a rehearing as to his status. Finally, the entertainment of a petition for conservatorship is a function of the superior and not the juvenile court.” (*In re Michael E.*, *supra*, 15 Cal.3d at pp. 192–193, internal citations and footnotes omitted.)

- “Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is ‘gravely disabled’ within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor ‘gravely disabled’ within the meaning of section 5008.” (*In re Michael E.*, *supra*, 15 Cal.3d at p. 192, fn. 12.)

## Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.4

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(New June 2005)

#### 4004. Issues Not to Be Considered

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**In determining whether [name of respondent] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is established.**

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#### Sources and Authority

- An instruction on this point “should be given.” (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 [200 Cal.Rptr. 262].)

(New June 2005)

## **4005. Obligation to Prove—Reasonable Doubt**

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[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

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### **Sources and Authority**

- “The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.” (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [590 P.2d 1, 152 Cal.Rptr. 425].)
- “A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are

satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof.”

(*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289], internal citation omitted.)

- “[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof.” (*Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415].)
- But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]: “Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction.”
- “Neither mental disorder nor grave disability is a crime.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369].)
- “In *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area.” (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796].)

## Secondary Sources

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(New June 2005)



## 4006. Sufficiency of Indirect Circumstantial Evidence

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You may not decide that [*name of respondent*] is gravely disabled based substantially on indirect evidence unless this evidence:

1. Is consistent with the conclusion that [*name of respondent*] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism]; and
2. Cannot be explained by any other reasonable conclusion.

If the indirect evidence suggests two reasonable interpretations, one of which suggests the existence of a grave disability and the other its nonexistence, then you must accept the interpretation that suggests [*name of respondent*] is not gravely disabled.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable one.

If you base your verdict on indirect evidence, [*name of petitioner*] must prove beyond a reasonable doubt each fact essential to your conclusion that [*name of respondent*] is gravely disabled.

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### Directions for Use

Read this instruction immediately after CACI No. 202, *Direct and Indirect Evidence*.

### Sources and Authority

- “[W]here proof to establish a conservatorship for a person alleged to be gravely disabled is based upon substantially circumstantial evidence, the proposed conservatee is entitled, on request in an appropriate case, to have the jurors instructed as to the principles

relevant when applying circumstantial evidence to the beyond a reasonable doubt burden of proof.” (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1088 [242 Cal.Rptr. 289].)

- “A proposed conservatee is entitled to procedural due process protections similar to a criminal defendant since fundamental liberty rights are at stake. The trial court had a sua sponte duty to correctly instruct on the general principles of law necessary for the jury’s understanding of the case.” (*Conservatorship of Walker, supra*, 196 Cal.App.3d at p. 1092, fn. 5, internal citations omitted.)
- “The court has no duty to give the [circumstantial evidence jury instructions applicable to criminal cases] in a case where the circumstantial evidence necessary to prove a certain mental state is not subject to any inference except that pointing to the existence of that mental state.” (*Conservatorship of Walker, supra*, 196 Cal.App.3d at p. 1098; *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1342 [249 Cal.Rptr. 415].)
- “Where a noncriminal case is to be evaluated by a reasonable doubt standard, it follows that a party on a proper state of the evidence is entitled on request to have jurors informed of the manner in which that standard must be established when the evidence consists substantially of circumstantial evidence.” (*Conservatorship of Walker, supra*, 196 Cal.App.3d at p. 1098.)

## Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.105

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(New June 2005)

## 4007. Third Party Assistance

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A person is not “gravely disabled” if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person’s basic needs for food, clothing, or shelter.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [*name of respondent*] with food, clothing, or shelter. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

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### Sources and Authority

- Welfare and Institutions Code section 5350(e) provides:
  - (1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not “gravely disabled” if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person’s basic personal needs for food, clothing, or shelter.
  - (2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.
  - (3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered

person in providing for the person's basic needs for food, clothing, or shelter.

- “[A] person is not ‘gravely disabled’ within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- “As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered.” (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [673 P.2d 209, 197 Cal.Rptr. 539].)
- “The California Supreme Court in *Conservatorship of Early* . . . concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society.” (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)
- “In *Conservatorship of Early* . . . the Supreme Court held that it was error for the trial court to refuse to admit evidence of and to fail to instruct on the ‘availability of assistance of others to meet the basic needs of a person afflicted with a mental disorder.’ ” (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 552–553 [200 Cal.Rptr. 262], citation omitted.)
- “Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law.” (*Conservatorship of Jones, supra*, 208 Cal.App.3d at p. 303.)
- “Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent’s mother], while well-intended, would not meet this requirement.” (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr. 2d 46], emphasis in original, footnote omitted.)

- “The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner’s mother’s] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), ‘is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person’s basic needs for food, clothing, or shelter.’ This was not the case here; [petitioner’s mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect.” (*Conservatorship of Johnson, supra*, 235 Cal.App.3d at p. 699 n. 5.)

## Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.11

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(New June 2005)

## **4008. Third Party Assistance to Minor**

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**A minor is not “gravely disabled” if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing and able to help provide for the minor’s health, safety, and development, including food, shelter, and clothing.**

**You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide for [name of respondent]’s health, safety, and development. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.**

**[Assistance provided by a correctional facility does not constitute third party assistance.]**

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### **Sources and Authority**

- Welfare and Institutions Code section 5350(e) provides:
  - (1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not “gravely disabled” if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person’s basic personal needs for food, clothing, or shelter.
  - (2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.
  - (3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is

willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.

- “[A] person is not ‘gravely disabled’ within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- “Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is ‘gravely disabled’ within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor ‘gravely disabled’ within the meaning of section 5008.” (*In re Michael E.* (1975) 15 Cal.3d 183, 192, fn. 12 [538 P.2d 231, 123 Cal.Rptr. 103].)
- “As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered.” (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [673 P.2d 209, 197 Cal.Rptr. 539].)
- “The California Supreme Court in *Conservatorship of Early* . . . concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society.” (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)

- “Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law.” (*Conservatorship of Jones, supra*, 208 Cal.App.3d at p. 303.)
- “Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent’s mother], while well-intended, would not meet this requirement.” (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr. 2d 46], emphasis in original, footnote omitted.)
- “The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner’s mother’s] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), ‘is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person’s basic needs for food, clothing, or shelter.’ This was not the case here; [petitioner’s mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect.” (*Conservatorship of Johnson, supra*, 235 Cal.App.3d at p. 699 n. 5.)

## Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.11

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(New June 2005)



## 4009. Physical Restraint

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**The fact that respondent has been brought before the court in physical restraints is not evidence of grave disability. You must not speculate on the reasons for such restraints.**

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### Directions for Use

When the restraints are concealed from the jury's view, this instruction should not be given unless requested by the conservatee since it might invite initial attention to the restraints and, thus, create prejudice, which would otherwise be avoided. (*People v. Duran* (1976) 16 Cal.3d 282, 292 [545 P.2d 1322, 127 Cal.Rptr. 618].)

In *Conservatorship of Warrack* (1992) 11 Cal.App.4th 641, 647 [14 Cal.Rptr. 2d 99], the court held that a proposed conservatee in a jury trial under the LPS Act may not be physically restrained unless the trial court follows the procedures outlined in *People v. Duran, supra*, 16 Cal.3d at pp. 288–290.

### Sources and Authority

- “The court in *People v. Duran*, held that where physical restraints are visible to the jury the trial court must give a cautionary instruction advising the jurors such restraints are not evidence of the defendant's guilt (disability) and that the jury should not speculate as to the reasons for such restraints. The court erred in failing to so instruct in this case.” (*Conservatorship of Warrack, supra*, 11 Cal.App.4th at p. 648, internal citation omitted.)

(New June 2005)

## 4010. Limiting Instruction—Expert Testimony

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**You have heard testimony by an expert witness regarding reports and statements from hospital staff and other persons who have come into contact with [name of respondent]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.**

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### Sources and Authority

- Evidence Code section 355 provides: “When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.”
- “A psychiatrist is permitted to testify on a person’s mental capacities and can rely on hearsay including statements made by the patient or by third persons.” (*Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1163 [226 Cal.Rptr. 142].)
- “When records are admitted . . . a limiting instruction need not be given, *sua sponte*, but must be given upon request of counsel.” (*Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281, 288 [144 Cal.Rptr. 241], internal citation omitted, disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255 [673 P.2d 209, 197 Cal.Rptr. 539].)

(New June 2005)

## **4011. History of Disorder Relevant to the Determination of Grave Disability**

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**You must consider information about the history of [name of respondent]’s alleged mental disorder if you believe this information has a direct bearing on whether [he/she] is presently gravely disabled as a result of a mental disorder. Such information may include testimony from persons who have provided, or are providing, mental health or related support services to [name of respondent], [his/her] medical records, including psychiatric records, or testimony from family members, [name of respondent], or any other person designated by [name of respondent].**

**You must not consider any evidence that you believe is irrelevant because it occurred either too long ago or under circumstances that are not similar to those involved in this case.**

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### **Sources and Authority**

- Welfare and Institutions Code section 5008.2(a) provides: “When applying the definition of mental disorder . . . , the historical course of the person’s mental disorder, as determined by available relevant information about the course of the person’s mental disorder, shall be considered when it has a direct bearing on the determination of whether the person is a danger to others, or to himself or herself, or is gravely disabled, as a result of a mental disorder. The historical course shall include, but is not limited to, evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient’s medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient. Facilities shall make every reasonable effort to make information provided by the patient’s family available to the court. The hearing officer, court, or jury shall exclude from consideration

evidence it determines to be irrelevant because of remoteness of time or dissimilarity of circumstances.”

### Secondary Sources

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

(New June 2005)

## 4012. Concluding Instruction

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**To find that [name of respondent] is gravely disabled, all twelve jurors must agree on the verdict. To find that [name of respondent] is not gravely disabled, only nine jurors must agree on the verdict. As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff].**

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### Directions for Use

Read this instruction immediately after CACI No. 5009, *Predeliberation Instructions*.

### Sources and Authority

- “The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.” (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [590 P.2d 1, 152 Cal.Rptr. 425].)
- “The Legislature’s determination that a three-fourths majority vote applies in LPS conservatorship proceedings is eminently sound in the context of finding a proposed conservatee is not gravely disabled.” (*Conservatorship of Rodney M.* (1996) 50 Cal.App.4th 1266, 1271–1272 [58 Cal.Rptr.2d 513].)
- “Permitting a finding of no grave disability to be based on a three-fourths majority coincides with *Roulet’s* goal of minimizing the risk of unjustified and needless conservatorships. It also avoids unnecessary confinement of the proposed conservatee while renewal proceedings are completed.” (*Conservatorship of Rodney M., supra*, 50 Cal.App.4th at p. 1270.)

### Secondary Sources

California Conservatorships and Guardianships (Cont.Ed.Bar 1990–2003), § 15.107

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, Part I, “Lanterman-Petris-Short Act and Related Proceedings” (Matthew Bender)

*(New June 2005)*

## 4013. Affidavit of Voter Registration

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If you find that [*name of respondent*], as a result of [a mental disorder/impairment by chronic alcoholism], is gravely disabled, then you must also decide whether [he/she] is capable of completing an affidavit of voter registration. To reach a verdict that [*name of respondent*] is not capable of completing an affidavit of voter registration, all 12 jurors must agree to that decision.

To complete an affidavit of voter registration, [*name of respondent*] must be able to state: the facts necessary to establish the [*name of respondent*] as a voter; [his/her] full name, residential address, and telephone number; [his/her] mailing address, if different from the residential address; [his/her] date of birth; the state or county of birth; [his/her] occupation; [his/her] political party affiliation; that [he/she] is not currently imprisoned or on parole for the conviction of a felony; and whether [he/she] has been registered at another address, under another name, or is intending to affiliate with another party, and if so the prior address, name, or party.

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### Directions for Use

This instruction should be given if the petition prays for this relief.

### Sources and Authority

- Elections Code section 2208 provides, in part:
  - (a) A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 2150 and any of the following apply:

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- (2) A conservator for the person or the person and estate is appointed pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

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- (b) If the proceeding under the Welfare and Institutions Code is heard by a jury, the jury shall unanimously find that the person is not capable of completing an affidavit of voter registration before the person shall be disqualified from voting.
- Elections Code section 2150 provides, in part:
    - (a) The affidavit of registration shall show:
      - (1) The facts necessary to establish the affiant as an elector.
      - (2) The affiant's name at length, including his or her given name, and a middle name or initial, or if the initial of the given name is customarily used, then the initial and middle name.
      - (3) The affiant's place of residence, residence telephone number, if furnished, and e-mail address, if furnished.
      - (4) The affiant's mailing address, if different from the place of residence.
      - (5) The affiant's date of birth to establish that he or she will be at least 18 years of age on or before the date of the next election.
      - (6) The state or country of the affiant's birth.
      - (7) The affiant's California driver's license number, California identification card number, or other identification number as specified by the Secretary of State.
      - (8) The affiant's political party affiliation.
      - (9) That the affiant is currently not imprisoned or on parole for the conviction of a felony.



- (10) A prior registration portion indicating whether the affiant has been registered at another address, under another name, or as intending to affiliate with another party. If the affiant has been so registered, he or she shall give an additional statement giving that address, name, or party.
- (b) The affiant shall certify the content of the affidavit as to its truth and correctness, under penalty of perjury, with the signature of his or her name and the date of signing. If the affiant is unable to write he or she shall sign with a mark or cross.
- (c) The affidavit of registration shall also contain a space that would enable the affiant to state his or her ethnicity or race, or both. An affiant may not be denied the ability to register because he or she declines to state his or her ethnicity or race.
- (d) If any person, including a deputy registrar, assists the affiant in completing the affidavit, that person shall sign and date the affidavit below the signature of the affiant.

### Secondary Sources

24 California Forms of Pleading and Practice, Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*, § 285.26  
(Matthew Bender)

(New June 2005)

**4014–4999. Reserved for Future Use**

## VF-4000. Conservatorship—Verdict Form

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Select one of the following two options:

- \_\_\_\_ 12 jurors find that [*name of respondent*] is presently  
gravely disabled due to [a mental disorder/impairment  
by chronic alcoholism].
- \_\_\_\_ 9 or more jurors find that [*name of respondent*] is not  
presently gravely disabled due to [a mental disorder/  
impairment by chronic alcoholism].

[If you have concluded that [*name of respondent*] is gravely  
disabled due to [a mental disorder/impairment by chronic  
alcoholism] then answer the following:

Do all 12 jurors find [*name of respondent*] is not capable  
of completing an affidavit of voter registration?

\_\_\_\_ Yes      \_\_\_\_ No]

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

[After it has been signed/After all verdict forms have been  
signed], deliver this verdict form to the [clerk/bailiff/judge].

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### Directions for Use

The question regarding voter registration is bracketed. The judge must  
decide whether this question is appropriate in a given case.

(New June 2005)

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